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IN THE

Supreme Court of the United States

October Term, 1929.

No. 311.

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, ET AL., EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE MAY, DECEASED, PETITIONERS,

vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR 23RD DISTRICT OF PENNSYLVANIA.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ AND BRIEF.

WARD LOVELESS,
Amicus Curiae.

TABLE OF CONTENTS.

Page

Argument:

I. The court below did not, and the circuit court of appeals in Nichols v. Bradley, 27 Fed. (2d), 47, did, observe the essential distinction between the Federal estate tax and inheritance taxes 4

The court below erroneously viewed the subject from the standpoint of the beneficiaries and not from the standpoint of the testator 5

Complete reservation of control of the property by the donor for his own benefit should not be confused with a mere contingent right over which the donor had no control whatsoever 6

The holding of the Circuit Court of Appeals of the First Circuit in Nichols v. Bradley, 27 Fed. (2d), 47, is squarely opposed to the holding below in May v. Heiner 7

II. The *inter vivos* transfer of a remainder interest is not a transfer intended to take effect in possession or enjoyment at or after death, within the meaning of the Revenue Act of 1918 9

A conveyance *inter vivos*, without power of revocation, passes the grantor's interest out of his possession, enjoyment and control, whether that interest be a fee, a life estate or a remainder, nor is such passing affected by the circumstance that the grantor may retain some other and different interest in the same property, as where he retains a life estate and conveys away the remainder 10

The history of death duty legislation elucidates the purpose of incorporating Section 401 (*c*) in the statute, showing its proper construction to be as indicated 16

III. If Section 402 (*c*) of the Revenue Act of 1918 is construed to include in the gross estate of the decedent the property transferred by her on May 15, 1917, and October 1, 1917, it is unconstitutional as so retroactively applied 17

IV. If Section 402 (*c*) of the Revenue Act of 1918 is construed to include in the gross estate of the decedent

Page

the property transferred by her on May 15, 1917, and October 1, 1917, it is unconstitutional because such transfers by the decedent bear no reasonable relation to the purposes sought to be accompl'shed by the taxing Act..... 19

The purpose of the Act was to tax transfers which are testamentary in character..... 19

Congress is without power to declare transfers to be testamentary in character which in fact are not such, and a statute which attempts to do so is arbitrary and unconstitutional..... 20

The transfers now before the court are not testamentary in character..... 21

TABLE OF CASES.

Arnold v. U. S., 62 Ct. of Claims, 439..... 12

Black v. State, 113 Wis., 205; 89 N. W., 522..... 20

Carnill v. McCaughn, 30 Fed. (2d), 696..... 12

Chase National Bank v. U. S., 278 U. S., 327..... 6

Curley v. Tait, 276 Fed., 840..... 8

Edwards v. Slocum, 264 U. S., 61..... 5

Frew v. Bowers, 12 Fed. (2d), 625..... 12

Harris v. Commissioner of Internal Revenue, 5 B. T. A., 41..... 18

Humes v. U. S., 276 U. S., 487..... 8

Ithaca Trust Co. v. U. S., 279 U. S., 151..... 5

Kahn v. Bowers (U. S. Dist. Ct., Southern Dist. N. Y.), T. D. 3821, V-1, Cumulative Bulletin, page 409; not in Federal Reporter..... 8

Knowlton v. Moore, 178 U. S., 41..... 5

McCaughn v. Girard Trust Co., 3 Fed. (2d), 618; reversed 11 Fed. (2d), 520..... 12

Miller v. U. S., 62 Ct. of Claims, 404..... 12

New York Trust Co. v. Eisner, 256 U. S., 345..... 5

Nichols v. Bradley, 27 Fed. (2d), 47..... 4, 6, 7, 8

Nichols v. Coolidge, 274 U. S., 531..... 12, 13, 19, 20, 21

Reinecke v. Northern Trust Co., 278 U. S., 339..... 5, 10, 12, 14, 15

Schlesinger v. Wisconsin, 270 U. S., 230..... 20

Y. M. C. A. v. Davis, 264 U. S., 47..... 5

REGULATIONS AND STATUTES.

Art. 11, Regs. 70..... 8

Sec. 401, Revenue Act of 1918..... 18

Sec. 401 (c), Revenue Act of 1918..... 9, 16

Sec. 402 (c), Revenue Act of 1918..... 9, 10, 11, 14, 17, 19

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ.

MAY IT PLEASE THE COURT:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

WARD LOVELESS,
Amicus Curiae.

IN THE

Supreme Court of the United States

October Term, 1929.

No. 311.

WALTER A. MAY ET AL., EXECUTORS OF PAULINE MAY,

vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE.

BRIEF OF WARD LOVELESS, AMICUS CURIÆ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement.

The petitioners filed a statement of claim, followed by an amended statement of claim, in the District Court below, for the recovery of Federal estate taxes. The respondent filed a motion to strike—the equiva-

lent of a demurrer—which the District Court below granted (25 Fed. (2d) 1004). On appeal to the Circuit Court of Appeals below, the District Court was affirmed (R. 41-42) and the propriety of such affirmance is now in question in this court.

The facts are sufficiently stated in the briefs of the parties.

Argument.

I

The Court below did not, and the Circuit Court of Appeals in Nichols v. Bradley, 27 Fed. (2d) 47, did, observe the essential distinction between inheritance taxes and the Federal estate tax.

The decision in this case in the court below is clearly based upon the construction by State courts of the phrase "to take effect in possession and enjoyment at or after death" as it appears in the State inheritance tax laws. It seems clear also that if the court had kept in mind the distinction between the Federal estate tax law and the inheritance tax laws of our several states, a different decision must have been arrived at.

The State inheritance tax laws are based upon the right of the beneficiary to take under the State laws governing the devolution of property at death. It is a tax on the right to receive and the amount of the tax depends upon the size of the bequest or devise, the exemption allowed, the relationship of the beneficiary to the decedent, etc.

The Federal estate tax on the contrary is not a tax upon the right to receive but it is an excise or death

duty imposed upon the passing of the property from the decedent at death.

The Government collects this duty out of the net assets of the estate before they are distributed and it then has no further interest in their distribution. When, how, to whom, or upon what conditions they are distributed is of no concern to it.

The question to be determined, therefore, in every case under the Federal estate tax law is: Does property pass from the decedent at, and by reason of, his death? This view of the law is now clearly supported by a number of familiar decisions. Mr. Justice Holmes said in *Ithaca Trust Company vs. U. S.*, 279 U. S. 151, 155: "The tax is on the act of the testator, not on the receipt of property by the legatees." Citing *Y. M. C. A. vs. Davis*, 264 U. S. 47, 50; *Knowlton vs. Moore*, 178 U. S. 41, 49; *New York Trust Company vs. Eisner*, 256 U. S. 345, 348, 349; *Edwards vs. Slocum*, 264 U. S. 61. The same view is expressed in *Reinecke vs. Northern Trust Company*, 278 U. S. 339, 348.

It is quite evident from the repeated references of the court below to the rights of the donees and the citation only of State authorities that the court was looking at the subject from the standpoint of the beneficiaries and not from the standpoint of the testator. The court says: "In order to escape the statute the donee must be in actual possession and enjoyment of the property before death." Thus the time when the donee takes is made the determining factor on whether a tax should be assessed. This is, of course, directly opposed to the view expressed by this court in the above cases.

Mrs. May parted with the title, possession, and enjoyment of the property three years before she died, retaining only a reversionary right to the income in the event that she survived her husband. Assuming that she died first, this reversionary right never ripened into possession or enjoyment; therefore, no property right and no possession or enjoyment of the property passed from her on her death. She was then in the same position as to this property as she would have been in if she had never owned it. How then can a tax be assessed upon it?

The Government is forced to take the position that, although Mrs. May had parted with the title, the possession and enjoyment, and all control over the property, and although nothing remained for her to do to complete the transfer, and although no property right or interest passed out of her at her death, nevertheless the transfer was incomplete either because the beneficiaries did not come into complete enjoyment until after her death or because the failure of the contingency to occur is in some way analogous to the termination of control held under a power of revocation, or the power to change the beneficiaries of an insurance policy such as in the *Chase National Bank* case, 278 U. S. 327.

But the complete reservation of the control of the property by the donor for his own benefit should not be confused with a mere contingent right over which the donor had no control whatsoever.

The question involved in this case is practically the same as that in *Nichols vs. Bradley*, 27 Federal (2d) 47. In that case as in *May vs. Heiner* the donor cre-

ated a trust upon such terms that she never again had any possession or enjoyment of the donated property and she retained no vested legal interest in it. In each case the terms of the trust were such that upon the happening of a certain contingency, an interest might revest in the donor. In each case, too, the contingency never happened so that, actually, neither title, possession nor enjoyment ever revested.

The revesting in the May case would have occurred if the donor had survived her husband; it would have occurred in the Nichols case if the donor had survived her daughters. Except for the fact that the May contingency was somewhat more likely to happen than the other because of the relative ages, the cases are the same. The holding of the Circuit Court of Appeals of the First Circuit in the *Nichols vs. Bradley* case is squarely opposed to the holding below in *May vs. Heiner*. The ground of the decision appears in the following paragraph from the opinion, page 48:

> "But we think that, upon making the trust deed, Mrs. Bradley parted with the possession and enjoyment of this half of the property contributed by her to the trust, and that she was to have no reversionary interest in this half unless the daughters and their issue failed to survive her, or (what is the same thing) unless she survived the daughters and their issue, which she did not do. Having died first, no reversionary interest ever arose in her favor. Her death did not pass the right to the possession and enjoyment of the half of the property and income here in question from her to the daughters and their issue. That right passed to them at once by the

declaration of trust, subject to defeasance in case they failed to survive Mrs. Bradley. Her death, however, before that of her daughters, foreclosed the possibility of a reversionary interest arising in her favor. In other words, her death did not effect the transfer of the possession and enjoyment of the property and income to the daughters from and after that time, but, having occurred during the lifetime of the daughters, it foreclosed the possibility of her acquiring a reversionary interest in this half of the property."

It is difficult to find a flaw in this clear reasoning and, of course, it is directly opposed to the reasoning in *May vs. Heiner*. It is significant that although the Government lost the *Nichols vs. Bradley* case, it did not ask this court to review it. In the *Nichols vs. Bradley* case, too, the court clearly indicates that it considers that the value of a reversionary interest is measured by the actual facts rather than by complicated mathematical computations based upon actuary's figures and the court holds that when Mrs. Bradley died such reversionary interest had no value and it then appeared as a matter of fact that it never did have any value. The same reasoning, of course, applies to the reversionary right of Mrs. May to the income in the event that she survived her husband.

See also Article 11, Regulations 70, *Kahn vs. Bowers*, U. S. Dist. Ct., Southern Dist., N. Y.; affirmed Circ. Ct. of Appeals, 2nd Circ., December 16, 1925, published by authority of Treasury Department as T. D. 3821, V-1 Cumulative Bulletin, page 409; not in Federal Reporter. *Curley vs. Tait*, 276 Fed. 840. *Humes vs. U. S.*, 276 U. S. 487.

II.

The inter vivos transfer of a remainder interest is not a transfer intended to take effect in possession or enjoyment at or after death within the meaning of the Revenue Act of 1918.

It is our contention under Section III, infra, that if Sec. 402 (c) of the Revenue Act of 1918 is construed to include in the gross estate of Mrs. May, the decedent, the property transferred by her on May 15, 1917, and October 1, 1917, it is unconstitutional.

To avoid this result, this section of the statute must, if possible, be so construed as not to include these transfers.

But irrespective of the question of unconstitutionality, we contend that, viewed in the light of the purpose sought to be accomplished by Sec. 401 (c), that section must be construed as not including these transfers.

Sec. 402 (c) includes two kinds of transfers, those in contemplation of death, and those intended to take effect in possession or enjoyment at or after death.

It is not contended by the Government that the present transfers were in contemplation of death. Therefore, if included at all, it must be as transfers intended to take effect in possession or enjoyment at or after death.

Sec. 402 of the statute defines the interests included in the gross estate, but imposes no tax.

The tax is imposed by Sec. 401 (*Reinecke vs. The Northern Trust Co.*, 278 U. S. 339, 348, *supra*).

By the express language of Sec. 401 the tax is limited to transfers of the estates of decedents, that is, property passing from decedents upon death.

Therefore the definitions of the gross estate contained in Sec. 402 are restricted by Sec. 401 to interests passing upon death.

In recognition of this, *Reinecke vs. The Northern Trust Company*, 278 U. S. 339, *supra*, holds that no trusts or interests are included within the scope of Sec. 402 (c) other than those passing from the possession, enjoyment or control of the donor at his death, and so taxable as transfers at death under Sec. 401 (p. 348).

The particular transfers there held taxable were those where the grantor retained the power of revocation, terminable at his death. For this reason the property remained his in effect until he died, for he could retake it under his power at any time, and the disposition was testamentary in character.

A conveyance *inter vivos*, without power of revocation, passes the grantor's interest out of his possession, enjoyment and control, whether that interest be a fee, a life estate or a remainder, nor is such passing affected by the circumstance that the grantor may retain some other and different interest in the same property, as where he retains a life estate and conveys away the remainder.

Such a remainder interest is a present vested interest, susceptible of separate control, possession and enjoyment, which may be sold, mortgaged or other-

wise dealt with, and may be appraised by deducting from the value of the property itself the value of the life-estate computed according to mortality tables.

It is significant that Sec. 402 (c), in defining the content of the gross estate, refrains from including transfers of the *property* itself, which might perhaps import the right to manual possession, but in express terms confines its scope to "any interest therein", thus explicitly recognizing that a partial interest in property may pass without a transfer of the property itself.

It must be presumed that Congress used this word "interest" advisedly, and since it is not restricted to any particular kind of interest, it must of necessity include remainder interests, or any other part less than the whole, just as it may include fractional interests.

A remainder interest, just as any other interest, may be transferred outright by conveyance *inter vivos*, or it may be transferred in contemplation of death, or by an instrument whereby the grantor retains the right of revocation, in which last mentioned case it would class as a transfer intended to take effect in possession or enjoyment at or after death.

Therefore it is to the nature of the conveyance rather than to the quantum or character of the interest conveyed that Sec. 402 (c) has reference.

It has been held in the following cases that a present *inter vivos* transfer of a remainder interest takes effect immediately in possession and enjoyment, not at or after death, for it classes as a *present* interest, in the language of the statute.

Frew vs. Bowers, 12 Fed. (2nd) 625 (C. C. A., 2nd Circ., June 1, 1926).

Miller vs. United States, 62 Ct. of Claims 404.

Arnold vs. United States, 62 Ct. of Claims 439.

McCaughn vs. Girard Trust Company, 3 Fed. (2nd) 618, reversed in 11 Fed. (2nd) 520.

In commenting on the decision of the Circuit Court of Appeals in the Girard case (last above cited), the court in *Carnill vs. McCaughn*, 30 Fed. (2nd) 696 (Dist. Ct., E. D. Penna., Feb. 13, 1929) said (p. 699):

> "The real question is whether there has not been, since the Girard Case, a modification of the doctrine there (and in many other cases) laid down, particularly since the rulings in the Coolidge Case, supra, and in Reinecke v. Northern Trust Co., 49 S. Ct. 123, 73 L. Ed.———, and Chase v. United States, 49 S. Ct. 126, 73 L. Ed.———, opinions which have just been handed down. We think there has been this modification.
>
> "Without prolonging the discussion, the doctrine now is that a given property may be included for tax purposes, to base the tax imposed (1) if the property forms part of the decedent's estate; (2) if it has been transferred in 'contemplation of death' in attempted evasion of the tax; (3) if the death of the decedent renders the transfer of the property complete and absolute, which before that was not complete as, for illustration, when a trust is created subject to a power of revocation or the like in the decedent, and (4) which is really included in the second, if such power of revocation be released in contemplation of death. This excludes as a basis for the tax (1) transfers made for a consideration; (2) transfers made by way of an

out and out gift not in contemplation of death; (3) *transfers by way of a gift of the remainder after a life estate reserved, when the gift is not in contemplation of death, is absolute, and the decedent up to the time of his death had no power of control over or to direct the course of distribution of the property by his action or non-action.* (Italics ours.)

"The property here in question is of the third above class, and the tax payment was in consequence unlawfully exacted. These later cases are in no sense in conflict with the Coolidge Case."

After the transfer, this remainder is no longer an asset of the grantor. Before he transferred it he had dominion over the property itself, which he could at will convert into cash, to be expended, used or given away as he pleased. This ownership and control passed out of him upon the transfer, leaving merely his interest in the income, terminable upon his death. He has lost the *jus disponendi* as well as the right to enjoy the fee.

Viewed in its legal aspects, he has no more interest in the property than if he had been given his life estate by some third party, with remainder to another. In neither case has he anything to transmit upon his death.

Similarly, if such third party had given to someone other than the decedent an estate for the life of the decedent, and the remainder to the decedent and his heirs, a deed executed by the latter of that remainder interest would pass from him all that he had, leaving nothing to be transferred at his death. In such

case, the nature of the remainder interest so transferred by the decedent in his lifetime would be precisely the same as the remainder transferred by him where he himself retains his life interest. In each case it is a present transfer of a definite interest.

This construction of Section 402 (c) of the statute leaves a definite meaning and purpose to the expression "intended to take effect in possession or enjoyment at or after his death." It is significant that this language makes the *intention* as to finality the criterion of taxability, rather than the nature of the interests created or conveyed by the instrument of transfer.

For example, the grantor may deliver an absolute present conveyance, but upon a collateral agreement that he shall be permitted to retain the possession and use of the property itself until his death, so that the deed, while apparently absolute on its face, does nevertheless not in fact take effect in possession and enjoyment until the grantor's death, that is, it is *intended* to take effect at the death.

Similarly, where the grantor retains the power of revocation, as in the Reinecke case, the transfer, though in terms taking effect at once as a transfer, is nevertheless not *intended* so to operate with finality, by reason of the collateral provision contained in the instrument which retains actual control in the grantor.

This distinction may be clarified by paraphrasing the language of the statute, so that, instead of reading, "intended to take effect in possession or enjoyment at or after death," it would be "intended not to take effect in possession or enjoyment upon delivery." This brings out the actual operation of this clause as

being a collateral limitation preventing the instrument from taking immediate effect in accordance with its terms, rather than a provision descriptive of the character of the interests created by the instrument.

Thus construed, the class of transfers included resemble more closely the other class with which they are here grouped, namely, transfers in contemplation of death, for both classes are apparently absolute conveyances, but in fact only become such upon death, and are therefore testamentary in character.

So the Reinecke case, enumerating the miscellaneous items of property included by Sec. 402 in the gross estate, points out that they are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death, giving as examples property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death (p. 348).

The category thus contemplated by the statute excludes present irrevocable *inter vivos* transfers of any presently existing estate or interest in the property, whether a remainder or other interest, and whether such remainder or other interest was created by virtue of limitations contained in the instrument of transfer or was previously existing.

Such transfer, when presently creating the interest transferred, and operating to transfer the same irrevocably *inter vivos,* is not a transfer *intended* to take effect in the future, but intended to take effect

upon delivery. It is not testamentary in character, and is not within the purview of the statute.

We submit that the history of death duty legislation elucidates the purpose of incorporating Sec. 401 (c) in the statute, showing its proper construction to be as we have indicated.

Originally the only transfers that were subjected to the tax were those by will and under the intestate laws. But it was found that testators avoided this tax by transfers in contemplation of death, or by transferring their property during their lifetime, while still reserving the control and disposition thereof by power of revocation and disposition. In order to prevent this, and to preserve to the Government the same revenue which it would derive if all this property had been held until death, the statute was amended to include a tax upon all such transfers, which were really testamentary in character. The transfers aimed at were those used as a substitute for a will.

It is therefore only when a transfer offers an inducement to a testator as an asylum of escape from the tax that it comes within the class made taxable. Measured by this test, a conveyance which passes from the grantor the entire interest in the property except the income for life, so that he no longer has the *jus disponendi*, or the right to the use and expenditure of the principal, deprives him of a valuable asset out of all proportion to the indirect benefit which he may receive through the avoidance of an estate tax on the property involved, for he himself never shares in that

benefit. It belongs entirely to those who take upon his death.

Therefore the making of such a transfer would not appeal to the normal individual as a desirable method of escaping the tax, for it would exact too great an economic penalty in other respects, in proportion to the object of tax avoidance.

Hence transfers of this type do not tend to produce the consequences which Congress sought to avoid by including Sec. 402 (c) in the Act, and are not within the purview of the act.

III.

If section 402 (c) of the Revenue Act of 1918 is construed to include in the gross estate of the decedent the property transferred by her on May 15, 1917, and October 1, 1917, it is unconstitutional as so retroactively applied.

The Revenue Act of 1916, as amended, was in force when the transfers here in question were made.

The Revenue Act of 1918 was passed after the making of these transfers, but before the death of the decedent, and was in effect at her death. By this Act, the Act of 1916, as amended, was repealed.

It is contended by the Government that the 1918 Act is a reenactment of the prior Act, which therefore operates without interruption.

Reference to the actual language of the 1918 Act, however, refutes this argument, for it is expressly provided to be *instead* of the prior statute, as follows:

> "Sec. 401. That (*in lieu of* the tax imposed by Title II of the Revenue Act of 1916, as amended, and *in lieu of* the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) *is hereby imposed* upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or a non resident of the United States:"

This is, by express provision, the enactment of a new law, to supersede the old. No other interpretation will fit the words, "*in lieu of the tax imposed by Title II of the Revenue Act of 1916,*" etc. The old tax is *replaced* by the new tax "hereby imposed," which affects only those "dying after the passage of this Act."

Later follows the express repeal of the prior law, without saving clause except as to taxes accrued (Section 1400). Such accrual could only take place upon death.

In the language of the Board of Tax Appeals in *Harris vs. Commissioner of Internal Revenue,* 5 B. T. A. 41, 44:

> "The effect of the repeal of Title IV of the Revenue Act of 1918 was to obliterate the repealed statute just as completely as if it had never been enacted into law, and it must be considered as a statute that never existed, except for the purpose set forth in Section 1400 (b) of the Revenue Act of 1921."

This new tax, as applied to Mrs. May's transfers, is retroactive.

We submit that Congress, which is without power, under *Nichols vs. Coolidge*, 274 U. S. 531, to impose a retroactive tax on past transfers, cannot derive such power from the fact that it had previously imposed a prospective tax upon the same transfers, but which had been removed.

The power so to tax subsists so long only as it is prospective. The non-exercise of the power, or its exercise followed by repeal, leaves the transfers tax-free, and Congress' lack of power to reach back and impose a new tax is a matter of substance.

When a past transfer has once been freed of the burden of a pre-existing tax, its status, as a matter of actual fact, is the same as that of any transfer which was not originally subject to tax. The tax is gone, and actualities cannot be ignored. So far as the future is concerned, both are equally entitled to protection from retrospective burdens.

The new enactment must be tested by the principles applicable to all statutes, must stand or fall according to its own content, and cannot draw for validity on pre-existing legislation.

IV.

If Section 402 (c) of the Revenue Act of 1918 is construed to include in the gross estate of the decedent the property transferred by her on May 15, 1917, and October 1, 1917, it is unconstitutional because such transfers by the decedent bear no reasonable relation to the purposes sought to be accomplished by the taxing Act.

The purpose of the Act was to tax transfers which are testamentary in character.

In *Nichols vs. Coolidge,* 274 U. S. 531, this Court said (p. 540):

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death."

A present transfer of a remainder *inter vivos* is not testamentary in character, and is not within the legitimate scope of Sec. 402 (c), for the reasons pointed out under Section II above.

Congress, in classifying transfers for the purpose of imposing an estate tax, or death duty, is without power to declare transfers to be testamentary in character which in fact are not such, and a statute which attempts to do so is arbitrary and unconstitutional.

It was definitely held in *Schlesinger vs. Wisconsin,* 270 U. S. 230, that it is the actual fact which governs, and that an instrument cannot be made testamentary in character by an attempt to classify it as such. In that case the Wisconsin statute was held invalid which provided that all material gifts made within six years of death should be conclusively presumed to have been made in contemplation of death. The court said that there was no adequate basis for the distinction made by the statute between gifts made within the six years and gifts at other times.

In *Black vs. State,* 113 Wis. 205, 89 N. W. 522, the court had the following to say concerning the requirements of legal and constitutional classification (p. 528):

> "* * * It is a trite expression that classification, in order to be legal, must be rational; it must be founded upon real differences of situation or conditions, which bear a just and proper relation to the attempted classification, and reasonably justify a difference of rule."

In *Nichols vs. Coolidge*, the Court further says (p. 542):

> "Undoubtedly, Congress may require that property subsequently transferred in *contemplation of death* be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity." (Italics ours.)

The right is thus confined to the inclusion of such transfers as may be classed with those in contemplation of death as being testamentary in character. We submit, as above stated, that the transfers now before the Court do not come within this category.

Respectfully submitted,

WARD LOVELESS,
Amicus Curiæ.